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THE NORTHERN SECURITIES CASE AND THE SHERMAN ANTI-TRUST ACT.

ALTHOUGH the primary object of this article is to consider briefly the recent decision of the United States Circuit Court of Appeals for the eighth circuit, in the case of United States *v.* Northern Securities Company and others,[1] yet, as that decision is founded wholly upon the Sherman Anti-Trust Act,[2] it is proper to begin by saying whatever it is proposed to say in regard to that Act.

Considering the noise that it has made, the Sherman Anti-Trust Act is very brief. It comprises only eight short sections, and occupies only a little more than a page in the Supplement to the Revised Statutes of the United States.[3] Section 1 declares illegal "every contract, combination (in the form of trust or otherwise), or conspiracy in restraint of trade or commerce among the several states, or with foreign nations"; and it further declares that "every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," and be punished accordingly. Section 2 declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire, with any other person or persons to monopolize any part of the trade or commerce among the several

[1] 120 Fed. Rep. 721.

[2] 26 Statutes at Large, c. 647, p. 209.

[3] P. 762.

states or with foreign nations," shall be deemed guilty of a misdemeanor, and shall be punished accordingly. Section 3 is not material for the present purpose. Section 4 invests "the several circuit courts of the United States with jurisdiction to prevent and restrain violations of this act"; and makes it "the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." Sections 5 and 6 are not material for the present purpose. Section 7 declares that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and costs of suit including a reasonable attorney's fee." Section 8 will be stated further on.[1]

The first observation to be made upon this statute is that, regarded as a piece of substantive legislation, it simply, in terms, declares certain acts illegal and criminal, and accordingly by implication forbids them. Has it also the effect of making such acts civil torts? No, clearly not. A civil tort must necessarily be an injury to some person in respect to his personal rights or his rights of property.[2] The person injured by a civil tort may be a private person, a corporation, or the state. That the acts forbidden by this statute injure any one's personal rights will not be claimed; and it is also clear that they injure no one's rights of property, and least of all any rights of property belonging to the state. What are the acts which are forbidden? First, the entering into certain contracts, combinations, or conspiracies. What contracts, combinations, or conspiracies? Such as shall be in restraint of trade or commerce among the several states or with foreign nations, *i. e.*,

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[1] See *infra*, p. 546.

[2] In 13 HARV. L. REV. 537, 659, in an article entitled "Classification of Rights and Wrongs," I have divided all civil rights into the two classes of absolute rights and relative rights, and I have also divided absolute rights into personal rights and rights of property. If any reader should object to the terms "absolute" and "relative," he can substitute for them the terms "*in rem*" and "*in personam*." In a note at p. 546 of the same article, I have stated my reasons for preferring the former to the latter. In omitting all reference to relative rights in this place, I do not wish to be understood as asserting that a relative right can never be the subject of a tort, my object being merely to avoid embarrassing myself and my readers with that question unnecessarily.

such as shall be entered into for that purpose, or with that object in view, or such as will produce, or have an inevitable tendency to produce, that effect. Secondly, the act or acts of monopolizing, or attempting to monopolize, or of combining or conspiring with any other person or persons to monopolize, any part of such trade or commerce. It is not necessary to deny that the act of carrying into effect a contract, combination, or conspiracy, or that the act or acts which may be consequential upon securing, or attempting to secure, or combining or conspiring with another person or other persons to secure a monopoly, may have the effect of injuring the rights of property of another person or other persons. And the authors of the statute appear to have thought such act or acts, or some of such acts, might have that effect.[1] But it is impossible that the mere act of entering into any contract, combination, or conspiracy, or the mere act of securing, or attempting to secure, or of combining or conspiring to secure, any monopoly should have the effect of injuring the property of any person whatever.

As, however, the Northern Securities Case is an action brought by the state, *i. e.*, by the United States, to "prevent and restrain" a violation of the act in question, it seems proper to inquire in what cases the state may maintain a suit in equity to prevent the commission of a civil tort. First, the state is an artificial person or body politic, and as such is the owner of property, and therefore it can, like other persons, whether natural or artificial, maintain suits in equity to prevent torts to its own property. It is not claimed, however, that any act or acts forbidden by this statute can constitute a tort to any property belonging to the United States. Secondly, it frequently happens that the state holds the title to property as representing the general public, the reason being that the general public, not being in law a person, can neither hold property in its own name nor sue in its own name, and hence it is represented by the state in both these respects. It follows, therefore, that the state has the same right to sue respecting property which it holds for the benefit of the general public that it has respecting property which it holds for its own benefit. The cases in which property is thus held by the state for the benefit of, and as representing, the general public, constitute two important classes, namely, first, cases of public highways of every description, including all railways, canals, navigable rivers, and tide-waters.

[1] See section 7 of the Act, *supra*, p. 540. An injury to one's business is an injury to his property. See the article before referred to, 13 HARV. L. REV. pp. 669–670.

Sometimes such property consists of a mere right of way, in which cases of course it is incorporeal, and sometimes it includes the ownership of the soil. When it consists merely of a right of way, the ownership of the soil is generally in the owners of the adjoining land, as in the case of common highways or roads; when it includes the ownership of the soil, the soil, as well as the right of way, is generally vested in the state, as in the cases of navigable rivers and tide-waters, though, in the case of railways, the title to the soil is generally vested in the railway companies themselves.[1] The second class of cases in which property is held by the state for the benefit of, and as representing the general public, comprises all cases of property held upon public trusts, *i. e.*, all property devoted to religious, charitable, or other public uses, but not including property owned by the state and held for its own purposes. Property thus held upon public trusts is generally derived from the munificence of private persons, and the legal title to it is generally vested originally in trustees; but when such trustees consist of natural persons, it frequently becomes impossible, after the lapse of considerable time, to trace the legal title to such property, or ascertain in whom it resides. What is the function of the state in respect of property thus held upon public trusts? First, to represent in all cases the general public as the *cestuis que trust* of such property, and to see that the trustee, if any, performs his duty; secondly, if there is no trustee, or none can be found, it is the duty of the state to supply the want of a trustee, and thus protect the property against strangers.

With property of this last description it will be admitted that the statute in question has nothing to do; and though it has been held[2] that the statute has to do with railways, that is not because the acts forbidden by it are liable to be committed against railways, but because they are liable to be committed by railway companies. In short, if the statute extends to railways, it is not because Congress was seeking to protect railways, regarded as public highways, against the acts of tort-feasors, but because it was seeking to protect the general public against any attempts by railway companies to establish and maintain unreasonable rates. But such attempts, even if successful, would not constitute civil torts, nor could they ever ripen into torts, which could be restrained and prevented at the suit of the United States, as rep-

[1] As to this first class of cases, see *In re* Debs, 158 U. S. 564, 586–593.

[2] United States *v.* Trans-Missouri Freight Ass., 166 U. S. 290.

resenting the general public. Thus, if two railway companies should enter into a contract with each other to advance the rates on their respective lines beyond what would be reasonable, no right, either public or private, would be infringed by such contract. Nor would the carrying out of such contract, by establishing and maintaining unreasonable rates, be an infringement of any right, public or private. If, however, any person should require either of those railway companies to carry his goods, and the latter should refuse to do so, except at the unreasonable rates thus established, it would thus infringe the personal right[1] of such person to have his goods carried at a reasonable rate, and accordingly such person could maintain an action for damages; but the United States could maintain no action except for a refusal to carry its own goods at a reasonable rate.

Upon the whole, therefore, it is clear that the Sherman Anti-Trust Act is a criminal statute pure and simple, *i. e.*, that it simply declares certain acts to be crimes, and provides for their punishment. It also confers upon courts of equity jurisdiction to "prevent and restrain" the commission of such acts, and thus furnishes an instance of a statute which confers upon courts of equity jurisdiction to restrain and prevent the commission of crimes.[2] Had not the Act conferred this jurisdiction in express terms, it is plain that no court of equity could have entertained any suit founded upon the Act.[3]

The second observation to be made upon the statute is that section 2 has no application to railways or railway companies. There is not, indeed, in the Act itself a single word which can lead any one to think that its authors had either railways or railway companies at all in their contemplation; and the only argument in favor of the view that the first section of the Act extends to railways or railway companies is founded wholly upon the com-

[1] See Note on p. 554.

[2] See Mr. Mack's article on "The Revival of Criminal Equity," 16 HARV. L. REV. 389–403.

[3] In *In re* Debs, 158 U. S. 564, 593, BREWER, J., in delivering the unanimous opinion of the court, said: "It is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law."

prehensiveness of the following words in that section, namely, "*all* contracts, combinations, and conspiracies."[1] As, however, sections 1 and 2 are wholly independent of each other, the words just quoted have no tendency to show that the two sections are coextensive in their application; and the extent of the application of section 2 must depend upon considerations applicable to that section alone. Section 2 declares that every person who shall do any of certain specified acts shall be deemed guilty of a misdemeanor; and if the acts so specified can be committed by railway companies as such, the words "every person" are sufficient to include such companies.[2] Can then railway companies commit the acts specified in section 2? That question depends upon the meaning of the words "any part of the trade or commerce among the several states, or with foreign nations." Undoubtedly, railways are by far the most important of all instruments of inland trade and commerce, but an instrument by means of which a thing is done, even though it be indispensable, is not the thing itself. Railways are also public highways, and as such are subject to the control of the state. Moreover, when used for the carriage of goods, the subjects of trade and commerce, from one state into or through another state, or other states, they become subject to the control of the United States. Trade and commerce, however, actually consist in buying and selling, though they may, perhaps, be also said to include certain necessary incidents of most buying and selling, as, for example, the carriage of goods bought and sold from the seller to the buyer. Thus, the buyer and seller must always take such carriage into consideration as sometimes causing an important item of expense incident to the buying and selling, and they should of course have a clear understanding as to whether such expense is to fall upon the buyer or the seller. It is only, however, in its relation to the buyer and seller of goods that the carriage of such goods can be said to be an incident of the buying and selling of them. In its relation to the carrier, who performs the service merely for hire, the carriage of goods bought and sold has no more to do with the buying and selling of them than any other service performed for hire upon them or in relation to them, whether with a view to their sale or as an immediate consequence of their sale. It has

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[1] See United States *v.* Trans-Missouri Freight Ass., *supra*.

[2] See section 8 of the Act, *infra*, p. 546.

been held [1] that even so important a thing as the manufacture of goods by their owner, though done solely with a view to selling them, is not trade or commerce in such goods; and this would be true even of the manufacture of goods by a seller of them, under an order from the buyer. Nor is it at all material whether the service of carrying goods for hire be performed in one state only or in more than one; if it is not trade and commerce when performed in one state only, it is not interstate trade and commerce when performed in more than one state.

As, therefore, the only thing that a railway company can monopolize is the carriage of goods and passengers for hire, and as such carriage does not constitute trade or commerce, it follows that railway companies are not within section 2 of the Act. The only monopoly which section 2 forbids is a monopoly of the goods which constitute the subjects of trade and commerce, so far as the trade and commerce in such goods is subject to the control of the United States. This explains the fact that section 2 forbids the monopoly of any part of such trade or commerce. To forbid a monopoly by a railway company of the carriage of any part of the goods carried by it would be absurd, as every railway company necessarily has a monopoly of the carriage of by far the greater part of the goods carried by it, and no railway company could live without such monopoly. It is only at what are known as competing points that a "shipper" of goods has any choice as to the railway by which he shall "ship" them.

The next question is: what are the acts which section 1 of the statute forbids? Or, to put the question in the concrete, and, at the same time, limit it to the Northern Securities Case, did it forbid the organization of the Northern Securities Company for the purpose of acquiring and holding a majority of the shares in the Northern Pacific and Great Northern Railroad Companies, and the carrying out of that purpose through the acquisition by that company of such shares? In answering this question in the affirmative, the Circuit Court of Appeals professed to follow three decisions of the Supreme Court, made in cases [2] arising upon the same statute, the Circuit Court holding that the Northern Securities Case could not be distinguished from those three cases, and hence was governed by them. Was the court right in thus hold-

[1] United States *v.* E. C. Knight Co., 156 U. S. 1.

[2] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505; Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211.

ing? No, it seems not. In two[1] of those three cases, several railway companies had associated themselves together, under articles of agreement, for the purpose of regulating the rates to be charged for the transportation of goods on their respective lines or systems, and making such rates stable and uniform; and, in the other case,[2] several manufacturers of a certain class of goods had associated themselves together, under articles of agreement, for the purpose of regulating the prices at which goods manufactured by them respectively should be sold. In the Northern Securities Case, on the other hand, there is only one person concerned, namely, the Northern Securities Company. Nor is it material that that company is only an artificial person, *i. e.*, a corporation. It was created by the State of New Jersey, has always remained in that state, and all the acts complained of were done in that state; and therefore the validity and lawfulness of those acts depend wholly upon the laws of New Jersey, unless they would have been made invalid and unlawful by the laws of the United States, if done by a natural person. Indeed, it is wholly immaterial to the United States whether any act done within the limits of a state is done by a natural or an artificial person, *i. e.*, the validity and lawfulness of the act, under the laws of the United States, can never depend upon whether the person doing it belonged to the one or the other of these two classes of persons. Accordingly, the Sherman Anti-Trust Act does not contain the slightest allusion to artificial persons, except in the seventh and eighth sections, and those two sections show conclusively that the Act intended to make no distinction between natural and artificial persons; for section 7 declares as stated *supra*,[3] while section 8 declares that "the word 'person' or 'persons,' whenever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Would it, then, have been a violation of the Act for any natural person to have acquired and owned, either a majority of the shares in the Northern Pacific and Great Northern Railroad Companies respectively, or all of them, or any number less than all? The court does not claim that it would have been, and that it would

[1] U. S. *v.* Trans-Missouri Freight Association and U. S. *v.* Joint Traffic Association.
[2] Addyston Pipe and Steel Co. *v.* U. S.
[3] P. 540.

not have been is a proposition too plain for argument; for no person can contract, or combine, or conspire with himself.

The court, therefore, clearly regarded it as indispensable to show that several persons were concerned in doing the acts which it adjudges unlawful, and it attempted to do so by going behind the Northern Securities Company, and treating the acts done by it as done by the natural persons who promoted and procured the organization of the company, and who caused it to acquire the shares in question; and accordingly the court likens the acquisition of the shares in question by the Northern Securities Company, not to their acquisition by a single natural person on his own account, but to their acquisition by a "trust."[1] But it is a complete answer to all this to say, first, that the acts adjudged unlawful were done, in point of law, by the Northern Securities Company itself, and by no one else; secondly, that in doing those acts, the Northern Securities Company was as completely within the law as any natural person would have been in doing the same acts; thirdly, that the procuring, inducing, or causing, of another person, whether natural or artificial, to do a lawful act, cannot possibly constitute an unlawful combination or conspiracy.

The next question is whether, assuming that the acts complained of violated the statute, the relief given in the Northern Securities Case is authorized by the Sherman Anti-Trust Act, or warranted by any principle of equity. That it is not warranted by any principle of equity, if not authorized by the Act, is plain from what has been already said, namely, that equity would have had no jurisdiction of the case, but for section 4 of the Act. Was then the relief given authorized by section 4? No, clearly not. What did that section authorize courts of equity to do? Simply to "prevent and restrain" the carrying into effect of any contract, combination, or conspiracy which the Act makes unlawful. In order to apply this section of the Act intelligently, it is necessary to distinguish between those contracts, combinations, and conspiracies, on the one hand, which create certain relations between the parties to them which are expected to continue, substantially unchanged, so long as the contract, combination, or conspiracy remains in force, and to which, therefore, the legal distinction between things executory and things executed is inapplicable, or as to which the distinction is merely a distinction between the future and the past, —

[1] 120 Fed. Rep. 721, 725.

between things already done, and things remaining to be done, and, on the other hand, contracts, combinations, and conspiracies, the carrying into effect of which will put an end to the relations between the parties to them which such contracts, combinations, and conspiracies originally created, but will result in the immediate creation of new and different relations, and as to which, therefore, the distinction between things executory and things executed is vital. To the former class belong the three cases already referred to, while the Northern Securities Case belongs to the latter class. In the former class of cases a court of equity may "prevent and restrain" the further carrying into effect of the contract, combination, or conspiracy so long as such contract, combination, or conspiracy remains in force. In other words, it will never be too late for the court to give relief as to the future until all occasion for relief is past. In the latter class of cases, on the other hand, relief can be given by way of restraint or prevention only so long as the contract, combination, or conspiracy remains executory. It is to be observed, however, that a contract, combination, or conspiracy may have two stages, both of which are executory, namely, a first stage, in which nothing has yet been executed, and a second stage, which, while it is the result of an execution of the first stage, is itself executory in turn; and, when such is the case, it must first be ascertained whether the statute forbids the execution of the first stage, or of the second stage, or of each stage; for if it forbids the execution of the first stage only, an injunction can be granted only so long as that stage remains executory, while, if it forbids the execution of the second stage only, an injunction can be granted only after the execution of the first stage and before the execution of the second stage. If, on the other hand, the statute forbids the execution of each stage, an injunction granted any time before the execution of the second stage will be in time. The Northern Securities Case furnishes a good illustration of these distinctions, assuming, of course, that the case is within the statute. The first stage of that case was the organization of the Northern Securities Company, while its second stage was the acquisition by that company of the shares of the Northern Pacific and Great Northern Railroad Companies. Whether the statute forbade the execution of each stage, if it forbade the execution of either, it seems not material to inquire, as no injunction was granted till long after the execution of the second stage, at least to the extent of the acquisition of more than a majority of the shares of each of the two

railway companies, and, therefore, long after it had ceased to be possible to grant any relief by way of prevention, except against the acquisition of any more of such shares.

The conclusion, therefore, is, that the court was never authorized to give any other than negative relief in the Northern Securities Case, *i. e.*, relief by way of prevention, even assuming that the case comes within the statute, and that the time had long gone by when any such relief could be given that would do the United States any good or the defendants much harm; and yet the court has managed to make a decree which has been said in print more than once to be the most important decree that was ever made. Whether that is so or not depends upon the meaning attached to the word "important." That a more iniquitous decree was never made may be asserted with much confidence. What, then, is the nature and character of this decree? First, while it is, in its terms, purely negative, it forbids what is not forbidden by the statute, either directly or indirectly, and what the court, therefore, had no authority to forbid; secondly, the negative relief was given solely with a view to compelling affirmative action to be taken by the defendants which the court well knew it had no means of compelling directly. That is to say, the Northern Securities Company having issued its own shares in exchange for shares in the Northern Pacific and Great Northern Railroad Companies, and the statute having, as the courts say, thus been violated, and it being too late to give relief by way of prevention, the court sought to compel the parties to the exchange to undo what had been done by re-exchanging the shares in the Northern Securities Company for the shares in the railway companies, and thus to accomplish the same object that might have been accomplished by giving negative relief, if it had not been too late to give such relief; and the court attempted to accomplish that object by declaring that the Northern Securities Company should never vote or receive dividends on any of the shares held by it in the Northern Pacific and Great Northern Railroad Companies; and as these shares constitute substantially the only assets of the Northern Securities Company, this was equivalent to declaring that the latter company should never pay dividends on its own shares issued in exchange for the shares in the two railway companies. Undoubtedly, the court expected its decree speedily to bring the parties to terms, especially as the only persons affected by the decree were the Northern Securities Company and its shareholders, and as the

latter had, therefore, everything in their own hands. The court, accordingly, expected the restraints of the decree to be only of short duration, and it therefore intimated to the parties that they could free themselves from those restraints at any moment by making the re-exchange before referred to. These considerations do not, however, affect the character of the decree in the slightest degree. It is still true that the decree is a final one, and that the restraints imposed by it are absolute and unqualified; and the only question, therefore, is whether, as they stand, they are legal or illegal.

I. The United States does not claim to have the slightest right or interest in the shares in question, either on its own account or as representing the general public, nor does it in any way impeach or question the title of the Northern Securities Company to those shares. It does, indeed, claim that the acquisition of those shares was forbidden by the Sherman Anti-Trust Act, and that the act of acquiring them was, therefore, a criminal offense; but that is no impeachment of the title of the Northern Securities Company. The mere fact that the acquisition of property is made criminal furnishes no ground for impeaching the title of the person acquiring it. The only way in which the title of a person in possession of property can be impeached is by the assertion of a title to that property in opposition to his, and, in the case of the shares in question, there is confessedly no person who does or can assert a title to them in opposition to the Northern Securities Company, and, for that reason, as has been shown, the acquisition of those shares by that company did not, and could not, constitute a civil tort. But even when property is acquired by one person from another by means of a civil tort, the latter can never impeach the title of the former, unless the tort be a statutory one, and the statute expressly declares that no title shall be acquired by means of such tort.[1] Equity may, indeed, sometimes give relief in such cases, but only by rescinding the transaction, *i. e.*, by compelling the tort-feasor to reconvey to the person injured what he has acquired from him, on receiving from the latter what he gave him in exchange.

II. Such then being the title of the Northern Securities Company to the shares in question, the decree declares that it shall

[1] Notable instances of such statutes will be found in 9 Anne, c. 14, against gaming, 12 Anne, statute 2, c. 16, against usury, and in the New York Statute of 1837 against usury. Laws of 1837, c. 430, p. 486.

never enjoy those shares except by alienating them. Moreover, so long as that company chooses to retain those shares, the decree produces two extraordinary results, namely, first, that two continental lines of railway are turned over to the control of a small minority[1] of their shareholders; secondly, that the bulk of the earnings of the same railways, applicable to the payment of dividends, is absolutely tied up.[2]

What then can be said in support of such a decree? The court claims that it is authorized by the statute, apparently on the theory that Congress must have intended to authorize any proceeding which the court should find necessary to carry out the purposes of the statute.[3] But the answer to that is that a lawgiver is supposed to mean only what he says, and that Congress, in conferring authority upon courts of justice in the statute in question, has used language so clear and explicit as to leave no room for doubt as to its meaning, and as to preclude any extension of its meaning by interpretation or construction. Whether, therefore, the statute itself would be valid, if it authorized such a decree, it is not necessary to inquire.

Can anything else be said in support of the decree? Only that the end justifies the means. Perhaps the court would not admit that it proceeded upon this theory, but it is the only theory or view that can be advanced in support of the decree, unless the court

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[1] Namely, a minority of about twenty-four per cent in the case of the Great Northern Railroad Company, and of about four per cent in the case of the Northern Pacific Railroad Company. See 120 Fed. Rep. 724.

[2] How serious a thing this is will be appreciated, when it is stated that the Northern Securities Company now holds upwards of 1,500,000 shares in the Northern Pacific Railroad Company, and upwards of 940,000 shares in the Great Northern Railroad Company, and that the former company is now paying dividends at the rate of 6 per cent, while the latter is paying at the rate of 7 per cent. It will thus be seen that the decree will tie up nearly sixteen millions of dollars annually.

[3] THAYER, J., delivering the opinion of the court, says (120 Fed. Rep. 730): "It would be a novel, not to say absurd, interpretation of the Anti-trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation."

was right in thinking the decree was authorized by the statute, and, if the court was right in so thinking, then it is the only theory that can be advanced in justification of the statute. It is to be hoped that no lawgiver or court of justice ever proceeded knowingly and consciously upon a theory so destructive of every principle of justice.

But what shall be said of the end for the attainment of which the court was tempted to make so extraordinary a decree? It is undoubtedly a common thing for a court of equity to rescind a transaction between two persons which has been procured by the fraud of one of them, *i.e.*, to compel the tort-feasor to restore what he has received from the person defrauded, upon the latter's restoring to him what he gave in exchange, equity thus restoring both parties to the situation that they were in when the fraudulent transaction took place. It is scarcely necessary to say, however, that such a rescission can be made by a court of equity only upon the application of the person defrauded, he being the only person who is entitled to a rescission as well as, presumably, the only person who desires one. Can a court of equity, then, rescind a transaction between two persons, in which neither has been defrauded by the other, neither has injured the other, which neither wishes to have rescinded, and which neither will join the other in rescinding, except upon compulsion? To do so would necessarily imply a suit in which both parties to the transaction to be rescinded are made defendants, and some person who is a stranger to that transaction is plaintiff, and the only plausible reason that could be given for such a suit would be that the plaintiff is the state, and is seeking to punish a crime, *i.e.*, is seeking to compel the defendants to undo a thing which has been done by them, and the doing of which has been made a crime. Such is the suit in question;[1] and hence we have the extraordinary spectacle of a court of equity attempting, indirectly, and by means of an illegal decree, to compel defendants, as the only means of escaping the penalties of that decree, to do what the court had no power to compel them to do, and that too by way of inflicting a punishment

[1] The reader will observe that section 4 of the Act does not say in whose name the suits which it directs shall be brought, but it directs them to be brought by a District Attorney of the United States, and it is only on behalf of the United States that the statute could direct suits to be brought, or a District Attorney to bring suits; and, as the statute furnishes no ground upon which a civil suit could be directed, of course the suits directed must be criminal.

for a crime. It seems scarcely necessary to add that the statute lends not the slightest countenance to such a proceeding.

The conclusion, therefore, is that the decree is a mere act of arbitrary power and utterly without justification or excuse. Lest, however, some reader should be apprehensive that its reversal would leave the public without protection against the "rapacity of railway monopolists," it seems proper to say that a powerful argument in support of the view that no part of the statute extends to railways or railway companies is derived from the fact that there was no call for such an act respecting them; that the only way in which railways can do an injury to the general public is by charging unreasonable rates for the services which they render, and that for such an injury the state already had an incomparably better remedy than any which the Sherman Anti-Trust Act can furnish, in its unquestioned power to regulate and control railway rates; that the principle of unlimited competition, as a means of keeping prices within reasonable limits, is not only inapplicable to railways, but, if applied to them, produces the greatest evils to the public as well as to the railways; that, if the state itself should undertake the duty of rendering to the public the services which are rendered by railway companies, every one would agree that its monopoly of such service should be complete and absolute; and when the state delegates to railway companies the right to render these services, and imposes upon them the corresponding duties, it becomes the function of the state, first, to see that those companies faithfully perform their duties to the public, and, secondly, to give them, so far as it is practicable, the same protection against competition that it would itself enjoy, namely, by permitting no railways to be constructed except under its own special authority, and by authorizing the construction of new railways only where those already existing are unable, or fail, to perform all the service which the public requires; that the ideal railway system would be a system comprising all the railways in any given state, and of course controlled by a single authority, namely, either by the direct authority of the state, or by the direct authority of those by whom the system is owned, acting, however, under such rules and regulations as the state from time to time sees fit to make; and such in particular is the system for which those who desire to see state ownership of railways should work; that, as has been already seen, the only competition possible among railway companies is at competing points, and that the only effect upon the public

of unrestrained competition at all competing points is, first, to give those who "ship" their goods at competing points lower rates than they are in justice entitled to receive, and, secondly, to give those unreasonably low rates at the expense of those who can "ship" their goods only at non-competing points; and, finally, that it was such competition as that just mentioned that caused the only great and widespread dissatisfaction with railway rates that ever existed in this country, and that the dissatisfaction thus caused was so great and widespread as to lead to the enactment of the Interstate Commerce Act.[1]

C. C. Langdell.

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[1] 24 Statutes at Large, c. 104, p. 379.

Note to p. 543. — It was through an inadvertence that I described in the text the right of a person to have his goods carried by a railway company at a reasonable rate as a "personal" right. The state imposes upon every railway company the duty of carrying the goods of every person at a reasonable rate, and hence the right of every person to have his goods so carried is a relative right, and a refusal to perform the correlative duty is a violation of the right, and constitutes a negative tort. See 13 HARV. L. REV. 537-8, 539, 542-6, 659-61.